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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEJUAN A. MARCOUX, Defendant and Appellant.	B210742 (Los Angeles County Super. Ct. No. BA289524)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Dejuan A. Marcoux was convicted by a jury of attempted willful, deliberate and premeditated murder and second degree robbery. The jury also found true several special firearm enhancement allegations and the special allegation Marcoux had inflicted great bodily injury. On appeal Marcoux contends insufficient evidence supports his convictions because his identification as a suspect was based on highly suggestive photographs and there was no other evidence he committed the offenses. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Marcoux was charged by information with one count of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664)[1] (count 1), one count of second degree robbery (§ 211) (count 2) and one count of attempted carjacking (§§ 215, subd. (a), 664) (count 3). The information specially alleged Marcoux had personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged the firearm (§ 12022.53, subd. (c)) and, as a result of discharging the firearm, caused great bodily injury or death (§ 12022.53, subd. (d)). It was also specially alleged Marcoux had personally inflicted great bodily injury in the commission of the offenses (§ 12022.7, subd. (a)) and had served a prior prison term for a felony (§ 667.5, subd. (b)). Marcoux pleaded not guilty and denied the special allegations.

2. *Summary of the Evidence Presented at Trial*

a. *The People's evidence*

On July 16, 2005 at about 3:15 a.m. William Jones and Lionel Larry, big-rig truck drivers for the United States Postal Service, were fueling their trucks at a gas station in Los Angeles. Larry testified he noticed several people, including Marcoux, "hanging out, asking for change and what not." As Larry, who had finished fueling his truck before Jones, was getting ready to leave the gas station, he saw Marcoux walk toward Jones. After Jones assured Larry he did not need to wait for Jones to finish fueling his truck, Larry left the station.

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1 Statutory references are to the Penal Code unless otherwise indicated.

Jones testified Marcoux approached him holding a gray pistol in his left hand. Marcoux demanded Jones's money and jewelry, and Jones gave him his gold necklace and $50. Although Jones told Marcoux he did not have anything inside his truck, Marcoux got into the driver's seat and told Jones, "Come up here." After Jones climbed onto the step outside the cab, he told Marcoux he could not get into the truck because Marcoux was sitting in the driver's seat. When Marcoux turned his back to get into the passenger's seat, Jones shoved him, jumped off the truck and began running toward the gas station's convenience store. Marcoux shot Jones, hitting him eight times, and then ran away.

Jones was taken to the hospital where he was interviewed by police detectives. Jones, who was in pain but fully conscious, described the man who had shot him as a five-foot-seven-inch Black male with a light complexion. Larry, who had driven to Santa Clarita after leaving the gas station, immediately returned upon learning Jones had been shot and reported what he had seen to police officers. Larry described the man who had approached Jones as Larry was leaving the gas station as a five-foot-six- to five-foot-seven-inch Black male with a light complexion and short hair.

On July 20, 2005, while Jones was still in the hospital, he met with a United States postal inspector who had experience in forensic composite art; and a composite sketch of the suspect was completed. When Larry was shown the composite sketch, he said it looked "somewhat close" to the man who had approached Jones at the gas station.

On July 25, 2005 Los Angeles Police Detective Joseph Harris took two books containing photographs of Black males who had been arrested in 2004 and the first half of 2005 to Jones's home. Jones did not identify anyone in the books as the man who had shot him. Harris took the books to Larry's home the following day. Larry also did not identify anyone in the books as the suspect.

Soon thereafter Detective Harris was informed that Los Angeles Police Officer Mark Brooks had seen the composite sketch and thought it resembled Marcoux, whom he had encountered several times. Harris obtained a photograph of Marcoux and placed it in the third position in a group of six photographs (a photographic "six-pack" lineup).

Harris showed the group of photographs to Jones on August 23, 2005, and Jones identified Marcoux as the man who had shot him. Jones also identified Marcoux as the shooter at the preliminary hearing on January 11, 2006 and again at trial in May 2008. Jones further testified at trial he was 99 percent certain he had correctly identified the perpetrator from the group of photographs and at the preliminary hearing.

On August 24, 2005 Detective Harris obtained a more recent photograph of Marcoux and prepared a second group of six photographs with the newer photograph in position number 2. (The other five photos were different from the photographs used in the first group of six shown to Jones.) On August 25, 2005 Larry selected the photograph of Marcoux as the man who had approached Jones. Larry also identified Marcoux at the preliminary hearing on January 11, 2006 and again at trial. Larry further testified at trial he was 95 percent certain he had correctly identified the man who had approached Jones from the group of photographs and at the preliminary hearing.

In January 2008, about five months before trial commenced, Los Angeles Police Detective Danetta Menifee (Detective Harris's partner at that time) learned Patrick Grisby, who lived in Jones's neighborhood, was claiming to have shot a mail carrier. Menifee prepared a new group of photographs with a picture of Grisby in the fourth position but without a picture of Marcoux. After viewing this group of photographs, Jones wrote, "Person in picture #6 looks like person that shot me. Person in custody is person that shot me." At trial Jones explained he did not mean by this that the person whose photograph appeared in position number six could have been the shooter, but that some of the man's features resembled those of the shooter's. Jones reiterated he "was sure after being three feet away from the person that shot me" that Marcoux was the perpetrator.

After Larry was shown the group of photographs with Grisby's picture, he wrote, "The man I saw in court and the man in the pic #3 was the man I seen [and] his hair was in two balls"; "The man [in] pic #3 look like the one that was by my truck." At trial Larry explained he was only 80 percent certain this identification was correct and

testified he believed the picture of the person in position number 3, who was neither Marcoux nor Grisby, was Marcoux.

b. *The defense's evidence*

Marcoux testified on his own behalf. He stated he did not recall where he was when the shooting occurred, but may have been home sleeping. Marcoux also testified he is right-handed and cannot do anything of significance with his left hand.

Marcoux presented the expert testimony of psychologist Dr. Mitchell Eisen on the subject of eyewitness identification and memory. Dr. Eisen testified life-threatening stress can limit a witness's ability to process information, as can the presence of a weapon because the witness will focus on the weapon, not the perpetrator's face or other details. Dr. Eisen also testified, among other things, bias can be introduced when constructing a photographic six-pack if one picture differs from the others or if there is only one person close enough to the suspect's description to be a possible match; and there is no significant relationship between a witness' confidence in the accuracy of an identification and the actual accuracy of the identification.

During the defense cross-examination of Jones, Jones agreed Marcoux had the lightest complexion of the people in the group of photographs from which he had selected Marcoux as the suspect, but denied complexion was a factor in his selection of Marcoux. Larry, on cross-examination, also agreed Marcoux had the lightest complexion of the people in the group of photographs from which he had selected Marcoux, but stated the lightness of his complexion was not "a major identifier" for him. Larry disagreed Marcoux's head appeared to be the "biggest head" in the photographs, explaining Marcoux's picture was merely "taken up close," a fact that did not cause Marcoux's picture to "just jump out" at him.

3. *The Jury's Verdict and Sentencing*

After the prosecution rested, the trial court granted the People's motion to dismiss count 3 in the interest of justice. (§ 1385.) The jury subsequently found Marcoux guilty of both attempted willful, deliberate and premeditated murder and robbery and found true the various firearm-use allegations. In a bifurcated proceeding Marcoux admitted the

prior prison term allegation. The trial court sentenced Marcoux to an aggregate state prison term of 27 years to life: Life with the possibility of parole for attempted willful, deliberate and premeditated murder (count 1), plus 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d); one year (one-third the three-year middle term) for robbery (count 2); and one year for the prior prison term enhancement. Sentences for the remaining firearm enhancements were stayed pursuant to section 654.[2]

DISCUSSION

1. *Substantial Evidence Support's Marcoux's Convictions*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

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2 Marcoux's five-year sentence in another case, GA062689, was ordered to run concurrent to the sentence in this case.

Marcoux contends there was insufficient evidence to support his convictions because the manner in which his photograph appeared in the groups of photographs shown to Jones and Larry was highly suggestive. Marcoux argues the only distinguishing facial characteristic Jones had identified in the perpetrator was a light complexion, and Marcoux had the lightest complexion of the people in the photographs shown to Jones. Similarly, Larry described the suspect as having a light complexion; and, in the group of photographs shown to Larry, Marcoux not only had the lightest complexion, but also the size of his head was larger than the size of anyone else's head.[3] Marcoux also argues the identifications were tenuous because, among other reasons, both men believed the suspect was five foot six inches to five foot seven inches tall, while Marcoux is only five foot three inches tall, and Jones testified he had initially looked at the suspect's gun, not his face and thus, consistent with Dr. Eisen's testimony, Jones was likely suffering from "weapon focus," which would have impaired his ability to accurately process or recall details about the perpetrator's appearance.

It is well settled that the testimony of a single witness, if believed by the finder of fact, is sufficient to support a conviction. (See Evid. Code, § 411 ["[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].) Thus, a single witness's identification of the defendant may be sufficient to sustain his or her

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3 Although Marcoux cites authority for the proposition a defendant is denied his or her constitutional right to due process if the identification procedures relied upon were so unduly suggestive as to give rise to a substantial likelihood of mistaken identity (*Neil v. Biggers* (1972) 409 U.S. 188, 196-197 [93 S.Ct. 375, 34 L.Ed.2d 401]), he does not advance that argument, which, in any event, has been forfeited because Marcoux failed to object on that basis at trial. (*People v. Medina* (1995) 11 Cal.4th 694, 753 [defendant's failure to object to identification procedure "as unduly suggestive and unreliable" "waived the point"].) Rather, Marcoux argues only "that the overly suggestive six-packs resulted in rather tenuous identifications, and that the entirety of the evidence failed to establish that he was the perpetrator of the offenses."

conviction. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime"].) Even if a witness has made an out-of-court identification but is unable to confirm that identification at trial, the evidentiary value of the out-of-court identification is not necessarily negated. (See *ibid*. [out-of-court identification "can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court"]; *People v. Cuevas* (1995) 12 Cal.4th 252, 257, 267-269, 271-272.)

To the extent there are any weaknesses in an eyewitness identification, the weight to be given the witness's testimony is for the jury to determine. (See *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372; *People v. Hawkins* (1968) 268 Cal.App.2d 99, 103.) An identification need not be free from doubt to have evidentiary value. (See, e.g., *People v. Midkiff* (1968) 262 Cal.App.2d 734, 740 ["identification of the defendant need not be positive"]; *People v. Robarge* (1952) 111 Cal.App.2d 87, 98 ["fact that a witness may to some extent qualify his testimony as to identification, goes to the weight of such testimony and is addressed to the sound discretion of the triers of fact"].) Indeed, a witness's statements that a suspect resembled or looked like the culprit may be sufficient evidence. (See *People v. Wiest* (1962) 205 Cal.App.2d 43, 45 ["[t]estimony that a defendant 'resembles' the robber [citation] or 'looks like the same man' [citation] has been held sufficient"].) Ultimately, "[t]he question of identification of the perpetrator of a crime is one for determination by the trier of fact and unless the evidence of identity is so weak as to constitute no evidence at all this court cannot set aside the decision of the trial court." (*People v. Kittrelle* (1951) 102 Cal.App.2d 149, 154; accord, *People v. Shaheen* (1953) 120 Cal.App.2d 629, 637.)

Jones's testimony alone was sufficient evidence from which the jury could conclude Marcoux committed the offenses. While Jones may have only provided a general description of a Black male with a light complexion to police officers shortly after he had been shot eight times and was waiting in the hospital to go into surgery, this does not demonstrate, as Marcoux argues, that Jones in fact failed to process information about the suspect's appearance or could not accurately recall the information. Four days

later Jones was able to work with a sketch artist, choosing individual facial features from books presenting an array of features, sufficient for the artist to render a sketch recognizable to Officer Brooks, who believed it resembled Marcoux. Five days later Jones was presented with more than 780 photographs of Black males, with varying complexions, and did not choose any suspect. Approximately one month later Jones selected Marcoux's photograph from the group of six photographs he was shown, an identification he testified he had made with 99 percent certainty. Jones again identified Marcoux at the preliminary hearing and at trial. Significantly, when Jones was shown the group of photographs including Grisby's picture in January 2008, he was able to recall Marcoux's features with such accuracy that he could characterize one of the photographs in the group as looking like Marcoux although clearly stating he was not the man who had shot Jones and "the person in custody is the person that shot me."

Jones's testimony, however, was not the only evidence linking Marcoux to the crimes. Larry's identification of Marcoux was comparable to Jones's in its credibility: Larry, who was not subject to any stress that might impede his ability to process or recall information, testified he got a good look at Marcoux, briefly making eye contact; and Larry did not simply default to choosing any Black male with a light complexion from the first group of photographs he was shown. Like Jones, Larry did not select a photograph from the two books containing more than 780 photographs, which he was shown within five days of the incident. However, Larry identified Marcoux one month later from the group of six photographs—an identification he testified had a 95 percent certainty to it. Although Larry erroneously selected a person other than Marcoux from the January 2008 group of photographs (position number three), he explained at trial he was only 80 percent certain that identification was correct, as compared to the earlier identifications he had made with a higher degree of certainty, and maintained he still believed the person depicted in position number three was Marcoux. (Indeed, there is at least some resemblance between the photographs of Marcoux and the person in position number 3.)

Finally, the jury was presented with the vigorous cross-examination of Jones and Larry and testimony from an expert regarding the fallibility and suggestibility of eyewitness identification even when made with emphatic certainty. The jury nevertheless concluded Marcoux had committed the offenses—a verdict that was supported by substantial evidence. (*People v. Keltie* (1983) 148 Cal.App.3d 773, 782; see *In re Gustavo M.* (1989) 214 Cal.App.3d 1485 1497 ["when the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court"].)

2. *The Trial Court Properly Exercised Its Discretion in Concluding There Was No Discoverable Material in Officer Brooks's Personnel File*

Prior to trial Marcoux made a motion under Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 for a review of Officer Brooks's personnel records to determine whether he had a history of engaging in any acts of misconduct including bias, dishonesty or coercive conduct. The trial court granted the motion, reviewed the records in an in camera hearing and found no discoverable information. At Marcoux's request, we have reviewed the sealed record of the in camera proceedings and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information; no abuse of discretion occurred. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.